# Ketua Pengarah Jabatan Penyiaran Malaysia & Anor v Vertex Blue Consulting Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-4-02 OF 2025(W)
ABU BAKAR JAIS PCA, HASNAH HASHIM CJ (MALAYA) AND VAZEER ALAM FCJ
12 NOVEMBER 2025

*Civil Procedure — Unless orders — Failure to comply — Respondent filed action against appellants for breach of concession agreement — Respondent filed application for discovery of documents — High Court granted order for discovery of documents — Discovery order contained unless order providing that failure to comply would result in striking out of defence and counter claim and judgment being entered in favour of respondent — Respondent argued that appellants failed to comply with discovery order — High Court struck out defence and counterclaim and declared concession agreement unlawful pursuant to unless order — Whether trial judge bound by unless order pronounced by interlocutory proceeding judge when unless order had similar effect as though summary judgment or judgment in default was entered against appellants — Government Proceedings Act 1956 s 42 — Rules of Court 2012 O 24, O 34 & O 73*

The respondent, a company involved in the business of providing advertising and media services, was the successful bidder in a tender exercise conducted by RTM to appoint an independent sales agent to carry out sales of the advertising time slots for its TV2, TVOkey and 33 radio stations. RTM came under the purview of the Director-General of Broadcasting Malaysia and the Government of Malaysia ('the appellants'). Following the successful bid, the respondent and the appellants entered into a concession agreement ('the agreement'). When the respondent failed to pay the contractually guaranteed minimum sum under the agreement, the appellants terminated the agreement. In response, the respondent filed an action in the High Court for a declaration that the agreement was wrongly terminated, and claimed for damages. The appellants on the other hand counterclaimed for the sum of RM43,482,881.27 as damages. Subsequently, the respondent filed applications for general and specific discovery of documents. With respect to the general discovery application, a consent order was recorded on 15 October 2019 whilst the specific discovery application was granted on 4 February 2020. Although the appellant had cooperated with the discovery orders, the respondent complained that the appellants' compliance with the orders was incomplete and unsatisfactory. Consequently, the respondent had applied and subsequently obtained a further discovery order on 12 October 2021 ('the order'). Paragraph 6 of the order was an unless order ('the unless order') stating

that the non-compliance of the order by the appellants would result in their defence and counterclaim being struck out without further order of the court and in such an event, judgment would be entered in favour of the respondent in accordance with the respondent's statement of claim. The appellants had provided the relevant documents pursuant to the order but the respondent contended that the appellants were still in breach of the order by failing to fully comply with its terms. The respondent then applied for adjournment of the case but such application was not allowed by the court considering that the case had been dragged for three years without any resolution. The respondent then raised the issue of the appellants' non-compliance with the order and sought default judgment as per the terms of para 6 of the order. The High Court agreed with the respondent and entered judgment for the respondent with a declaration that the termination of the agreement was unlawful. On appeal, the Court of Appeal agreed with the High Court's decision, hence, the present appeal. The question of law to be determined by the court in the present appeal was whether the trial judge was bound by the unless order pronounced by the interlocutory proceeding judge when the unless order had the similar effect as though a summary judgment or judgment in default was entered against the appellants wherein it failed to comply with the provision of O 73 of the Rules of Court 2012 ('the ROC 2012') and s 42 of the Government Proceedings Act 1956 ('Act 359').

**Held**, allowing the appeal, setting aside the judgment and order of both the High Court and Court of Appeal, and remitting the matter to the High Court for trial:

(1) **(per Vazeer Alam Mydin Meera FCJ, majority)** Declarations were a form of specific relief, which was subject to the court's discretion, even if the defendant had not responded to the claim. A default judgment in the form of a declaration typically could not be made without the court considering the merits of the case. In essence, the court acted as a safeguard when a claimant sought a declaration via default or summary judgment, requiring a substantive review to ensure the relief was appropriate and just, rather than simply rubber-stamping the request (see paras 17–18).

(2) **(per Vazeer Alam Mydin Meera FCJ, majority)** It was very clear that in the present case, the default judgment containing the declaratory order was made without the benefit of any evidence on which the High Court could have properly exercised its discretion. As such, the default judgment granted summarily was not a proper judgment on its merits and to that extent, the court found that the Court of Appeal and the High Court had fallen into error. The judgment of the High Court was irregular, and the Court of Appeal's affirmation of that judgment was wrong in law. In the circumstances, in the absence of any supporting evidence, the trial judge was not bound by the terms of the order to grant

default judgment on the basis of mere non-compliance of the order. In the circumstances of the facts of the present case, the leave question was answered in the negative (see paras 21–23).

(3) **(per Abu Bakar Jais PCA, dissenting)** The order could not be equated as summary judgment as submitted by the appellants. The order was made as preliminary direction given for the disclosure of the documents before full trial. While a summary judgment is granted by evaluating the pleadings to conclude there is no defence to the claim filed. The order was made even before the need to evaluate the defence. The non-compliance with the terms of the order by the appellants resulted in judgment being entered against them. It did not require the evaluation of the defence. That was precisely why the appellants were in error to consider the order as similarly as a summary judgment (see para 53).

(4) **(per Abu Bakar Jais PCA, dissenting)** It could not be correct law to say the appellants were absolved from liability because they were government entities and as such, no judgment could be entered against them as it amounted to summary judgment against the government. The judgment must be entered against the appellants as they had simply disobeyed the order which included the unless order. It had no nexus with a summary judgment (see para 54).

(5) **(per Abu Bakar Jais PCA, dissenting)** The action of the appellants in not complying with the terms of the order was quite clear. If the unless order was not given effect, the appellants not only could avoid obligation to disclose the documents but also had the effect of allowing the appellants to ignore the directions of the courts. This among others would directly hamper and frustrate the ability for courts to issue directions to properly manage the case before the trial as provided by O 34 of the ROC 2012 for pre-trial case management (see para 55).

(6) **(per Abu Bakar Jais PCA, dissenting)** There could be no doubt that the order was a binding court order issued in the ordinary course of court proceedings. There was also no appeal by the appellants against the order which meant that the appellants accepted the terms of the order. The order thus must be obeyed and any judgment or ruling to the contrary would not only invite disrespect to directions issued by the courts by such orders but also gives the damaging impression that there were instances that court orders needed not be complied with. Further, the unless order was also unambiguous and self-executing in nature and the failure to comply with the order, should mean the appellants must face the consequences and penalty that accordingly ensued (see paras 56–58).

(7) **(per Abu Bakar Jais PCA, dissenting)** The order was made pursuant to the respondent's application by virtue of O 24 of the ROC 2012 for the discovery of the documents and this provision was specific in nature. This

was in contrast to O 73 of the ROC 2012 which was more of a general provision relied by the appellants on proceedings by and against the government. Hence, the principle of 'generalia specialibus non derogant' ('general things do not detract from special things') would thus apply against the appellants. In this sense, the application regarding the disclosure of the documents must take precedence over the issue of whether summary judgement had been entered against the appellants. Section 42 of Act 359 would not assist the appellants in the present appeal as the order was a specific order about the requirement to disclose the documents and had no or little connection with a summary judgment. The non-compliance of the order itself and the court's direction regarding the documents resulted in judgment being entered against the appellants and not because there were no merits to the defence and counterclaim of the appellants (see paras 59–60).

**[Bahasa Malaysia summary**

Responden, sebuah syarikat yang terlibat dalam perniagaan penyediaan perkhidmatan pengiklanan dan media, merupakan pembida yang berjaya dalam tender yang dijalankan oleh RTM untuk melantik ejen jualan bebas bagi menjalankan penjualan slot masa pengiklanan untuk TV2, TVOkey dan 33 stesen radionya. RTM berada di bawah bidang kuasa Ketua Pengarah Penyiaran Malaysia dan Kerajaan Malaysia ('perayu-perayu'). Berikutan bidaan yang berjaya tersebut, responden dan perayu-perayu memeterai perjanjian konsesi ('perjanjian tersebut'). Apabila responden gagal membayar jumlah minimum yang dijamin secara kontrak di bawah perjanjian tersebut, perayu-perayu menamatkan perjanjian tersebut. Sebagai tindak balas, responden memfailkan tindakan di Mahkamah Tinggi untuk pengisytiharan bahawa perjanjian tersebut telah ditamatkan secara salah, dan menuntut ganti rugi. Sebaliknya, perayu-perayu menuntut balas sejumlah RM43,482,881.27 sebagai ganti rugi. Seterusnya, responden memfailkan permohonan untuk penzahiran dokumen-dokumen umum dan khusus. Berkenaan dengan permohonan penzahiran umum, perintah persetujuan telah direkodkan pada 15 Oktober 2019 manakala permohonan penzahiran khusus telah diberikan pada 4 Februari 2020. Walaupun perayu-perayu telah melaksanakan perintah-perintah penzahiran tersebut, responden mengadu bahawa pematuhan perayu-perayu terhadap perintah-perintah tersebut tidak lengkap dan tidak memuaskan. Akibatnya, responden telah memohon dan seterusnya memperoleh perintah penzahiran selanjutnya pada 12 Oktober 2021 ('perintah tersebut'). Perenggan 6 perintah tersebut adalah perintah melainkan ('perintah melainkan') yang menyatakan bahawa ketidakpatuhan perintah tersebut oleh perayu-perayu akan mengakibatkan pembelaan dan tuntutan balas mereka dibatalkan tanpa perintah selanjutnya daripada mahkamah dan dalam keadaan sedemikian, penghakiman akan diberikan memihak kepada responden mengikut pernyataan tuntutan responden. Perayu-perayu telah memberikan dokumen-dokumen yang berkaitan menurut perintah tersebut

tetapi responden berpendapat bahawa perayu-perayu masih melanggar perintah tersebut dengan gagal mematuhi sepenuhnya terma-termanya. Responden kemudiannya memohon penangguhan kes tetapi permohonan tersebut tidak dibenarkan oleh mahkamah memandangkan kes tersebut telah berlarutan selama tiga tahun tanpa apa-apa penyelesaian. Responden kemudiannya membangkitkan isu ketidakpatuhan perayu-perayu terhadap perintah tersebut dan memohon penghakiman ingkar mengikut terma perenggan 6 perintah tersebut. Mahkamah Tinggi bersetuju dengan responden dan memasukkan penghakiman untuk responden dengan pengisytiharan bahawa penamatan perjanjian tersebut adalah menyalahi undang-undang. Atas rayuan, Mahkamah Rayuan bersetuju dengan keputusan Mahkamah Tinggi, justeru, rayuan semasa dikemukakan. Persoalan undang-undang yang perlu ditentukan oleh mahkamah dalam rayuan semasa ialah sama ada hakim bicara terikat dengan perintah melainkan yang diberikan oleh hakim prosiding interlokutori apabila perintah melainkan tersebut mempunyai kesan yang sama seperti penghakiman terus atau penghakiman ingkar telah dimasukkan terhadap perayu-perayu di mana ia gagal mematuhi peruntukan A 73 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan s 42 Akta Prosiding Kerajaan 1956 ('Akta 359').

**Diputuskan**, membenarkan rayuan, mengenepikan penghakiman dan perintah Mahkamah Tinggi dan Mahkamah Rayuan, dan mengembalikan kes kepada Mahkamah Tinggi untuk perbicaraan:

(1) **(oleh Vazeer Alam Mydin Meera HMP, majoriti)** Perisytiharan merupakan satu bentuk relif khusus, yang tertakluk kepada budi bicara mahkamah, walaupun defendan tidak memberi maklum balas terhadap tuntutan tersebut. Penghakiman ingkar dalam bentuk perisytiharan biasanya tidak boleh dibuat tanpa mahkamah mempertimbangkan merit kes tersebut. Pada dasarnya, mahkamah bertindak sebagai perlindungan apabila penuntut memohon perisytiharan melalui penghakiman ingkar atau penghakiman terus, yang memerlukan semakan substantif untuk memastikan relif tersebut sesuai dan adil, dan bukannya sekadar membuat cap getah atas permohonan tersebut (lihat perenggan 17–18).

(2) **(oleh Vazeer Alam Mydin Meera HMP, majoriti)** Adalah sangat jelas bahawa dalam kes semasa, penghakiman ingkar yang mengandungi perintah pengisytiharan tersebut telah dibuat tanpa apa-apa keterangan yang boleh digunakan oleh Mahkamah Tinggi untuk melaksanakan budi bicaranya dengan sewajarnya. Oleh itu, penghakiman ingkar tersebut yang diberikan secara terus bukanlah penghakiman yang wajar berdasarkan meritnya dan setakat itu, mahkamah mendapati bahawa Mahkamah Rayuan dan Mahkamah Tinggi telah melakukan kekhilafan. Penghakiman Mahkamah Tinggi adalah tidak teratur, dan pengesahan Mahkamah Rayuan terhadap penghakiman tersebut adalah salah dari segi undang-undang. Dalam keadaan tersebut, jika tiada apa-apa

keterangan sokongan, hakim bicara tidak terikat dengan terma perintah tersebut untuk memberikan penghakiman ingkar atas dasar ketidakpatuhan perintah tersebut. Dalam keadaan fakta kes semasa, persoalan undang-undang tersebut dijawab secara negatif (lihat perenggan 21–23).

(3) **(oleh Abu Bakar Jais PMR, menentang)** Perintah tersebut tidak boleh disamakan sebagai penghakiman terus seperti yang dihujahkan oleh perayu-perayu. Perintah tersebut dibuat sebagai arahan awal yang diberikan untuk pendedahan dokumen-dokumen tersebut sebelum perbicaraan penuh. Penghakiman terus diberikan dengan menilai pembelaan untuk menyimpulkan bahawa tiada pembelaan terhadap tuntutan yang difailkan. Perintah tersebut sebaliknya dibuat sebelum keperluan untuk menilai pembelaan lagi. Ketidakpatuhan terhadap terma-terma perintah tersebut oleh perayu-perayu mengakibatkan penghakiman dimasukkan terhadap mereka. Ia tidak memerlukan penilaian pembelaan. Itulah sebabnya perayu-perayu terkhilaf dalam menganggap bahawa perintah tersebut sama seperti penghakiman terus (lihat perenggan 53).

(4) **(oleh Abu Bakar Jais PMR, menentang)** Adalah bukan undang-undang yang betul untuk mengatakan bahawa perayu-perayu telah dibebaskan daripada liabiliti kerana mereka adalah entiti kerajaan dan oleh itu, tiada penghakiman boleh dibuat terhadap mereka kerana ia merupakan penghakiman terus terhadap kerajaan. Penghakiman harus dibuat terhadap perayu-perayu hanya kerana mereka mengingkari perintah tersebut yang merangkumi perintah melainkan tersebut. Ia tidak mempunyai hubungan dengan penghakiman terus (lihat perenggan 54).

(5) **(oleh Abu Bakar Jais PMR, menentang)** Tindakan perayu-perayu dalam tidak mematuhi terma perintah tersebut adalah agak jelas. Jika perintah melainkan tersebut tidak dikuatkuasakan, perayu-perayu bukan sahaja boleh mengelak daripada kewajipan untuk mendedahkan dokumen-dokumen tersebut tetapi juga mempunyai kesan membenarkan perayu-perayu mengabaikan arahan mahkamah. Ini antara lain akan secara langsung menghalang dan menggagalkan keupayaan mahkamah untuk mengeluarkan arahan bagi menguruskan kes dengan betul sebelum perbicaraan seperti yang diperuntukkan di bawah A 34 KKM 2012 untuk pengurusan kes pra-perbicaraan (lihat perenggan 55).

(6) **(oleh Abu Bakar Jais PMR, menentang)** Tidak syak lagi bahawa perintah tersebut merupakan perintah mahkamah yang mengikat yang dikeluarkan dalam proses biasa prosiding mahkamah. Tiada rayuan daripada perayu terhadap perintah tersebut yang bermaksud bahawa perayu menerima terma-terma perintah tersebut. Oleh itu, perintah

tersebut harus dipatuhi dan apa-apa penghakiman atau keputusan yang bertentangan bukan sahaja akan mengundang rasa tidak hormat terhadap arahan yang dikeluarkan oleh mahkamah melalui perintah tersebut tetapi juga memberikan gambaran yang merosakkan bahawa terdapat keadaan di mana perintah mahkamah tidak perlu dipatuhi. Tambahan pula, perintah melainkan tersebut juga tidak samar-samar dan bersifat pelaksanaan sendiri dan kegagalan untuk mematuhi perintah tersebut, bermakna perayu-perayu harus menghadapi akibat dan penalti yang sewajarnya seperti yang ditetapkan (lihat perenggan 56–58).

(7) **(oleh Abu Bakar Jais PMR, menentang)** Perintah tersebut dibuat menurut permohonan responden berdasarkan A 24 KKM 2012 untuk penzahiran dokumen-dokumen tersebut dan peruntukan ini bersifat khusus. Ini berbeza dengan A 73 KKM 2012 yang lebih merupakan peruntukan umum yang diandalkan oleh perayu-perayu mengenai prosiding oleh dan terhadap kerajaan. Oleh itu, prinsip 'generalia specialibus non derogant' ('perkara umum tidak mengurangkan perkara khas') akan terpakai terhadap perayu-perayu. Dalam erti kata ini, permohonan mengenai penzahiran dokumen harus diutamakan berbanding isu sama ada penghakiman terus telah dibuat terhadap perayu-perayu. Seksyen 42 Akta 359 tidak akan membantu perayu-perayu dalam rayuan semasa kerana perintah tersebut merupakan perintah khusus tentang keperluan untuk mendedahkan dokumen dan tidak mempunyai atau sedikit kaitan dengan penghakiman terus. Ketidakpatuhan terhadap perintah itu sendiri dan arahan mahkamah mengenai dokumen-dokumen tersebut mengakibatkan penghakiman dibuat terhadap perayu-perayu dan bukan kerana tiada merit kepada pembelaan dan tuntutan balas perayu-perayu (lihat perenggan 59–60).]

**Cases referred to**

*Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168, FC (folld)
*Ann Joo Steel Berhad v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2019] MLJU 843; [2019] 5 MLRA 553, FC (refd)
*Hup Soon Omnibus Co Sdn Bhd & Anor v Lim Chee @ Lam Kum Chee* [2017] MLJU 1937; [2018] 1 CLJ 641, CA (refd)
*Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2012] 9 CLJ 557, FC (refd)
*Wallersteiner v Moir* [1974] 3 All ER 217; [1974] 1 WLR 991, CA (refd)

**Legislation referred to**

Government Proceedings Act 1956 s 42
Rules of Court 2012 O 14 r 1, O 24, O 34, O 73, O 73 r 5(1), O 81 r 1

**Appeal from**: Civil Appeal No W-01(NCvC)(W)-898–12 of 2022 (Court of Appeal, Putrajaya)

*Nur Irmawatie Daud (with Saravanan Kuppusamy) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.*
*Ariff bin Rozhan (with Christopher Arun a/l Francis, Sylvie Tan and Nurul Farhani bt Kamarudin (Ariff Rozhan & Co) for the respondent.*

**Vazeer Alam FCJ (delivering majority judgment of the court):**

INTRODUCTION

**[1]** The plaintiff/respondent, Vertex Blue Consulting Sdn Bhd, is in the business of providing advertising and media services. The plaintiff was the successful bidder in a tender exercise conducted by RTM to appoint an independent sales agent to carry out the sales of the advertising time slots for its TV2, TVOkey and 33 radio stations ('tender exercise'). RTM comes under the purview of the defendants/appellants.

**[2]** The parties then entered into a concession agreement dated 4 July 2017 for a period of five years ('concession agreement').

**[3]** The plaintiff claimed that the defendants in breach of contract had wrongly terminated the concession agreement. Thus, the plaintiff filed a suit in the High Court seeking, inter alia, a declaration that the concession agreement was wrongly terminated, and claiming damages based on losses it had allegedly suffered.

**[4]** The defendants denied breach of contract and alleged that it was the plaintiff who had in fact breached the concession agreement by failing to pay the contractually guaranteed minimum sum. Thus, the defendants contended that the termination of the agreement was lawful, and counterclaimed the sum of RM43,482,881.27 as damages.

THE HIGH COURT DISCOVERY ORDERS

**[5]** At the High Court, the plaintiff filed two applications under the Rules of Court 2012 for discovery of documents, which may be categorised as:

(a) a general discovery application; and

(b) a specific discovery application for six categories of documents.

**[6]** A consent order for general discovery was recorded on 15 October 2019, and the specific discovery application was granted on 4 February 2020.

**[7]** The defendants cooperated and gave discovery of the documents sought. The defendants in fact arranged for the plaintiff to be present at the RTM

premises for the purpose of inspection and production of the documents sought. However, the plaintiff complained that the defendants' compliance with both orders was incomplete and unsatisfactory. Consequently, the plaintiff filed a further discovery application on 8 July 2021, seeking additional documents from the six categories specified earlier. This application was granted on 12 October 2021 ('order').

**[8]** In the order, para 6 was an unless order ('the unless order') which stated as follows:

> (6) that unless the Defendants comply with the Orders made herein, the Defendants' Defence and Counterclaim in this Suit dated 28.2.2019 and filed herein, shall stand struck out without further Order of Court and the action herein shall be adjudged in the Plaintiff's favour with the requisite Orders and/or Judgment entered as prayed for by the Plaintiff.

**[9]** Subsequently, although further documents were provided on 19 November 2021, the plaintiff contended that the defendants were still in breach of the order by failing to fully comply with its terms. Thus, on the first day of trial the plaintiff sought an adjournment, and when it was not allowed by the court, counsel then raised the issue of the defendants' non-compliance of the order and sought default judgment as per the terms of para (6) of the order.

**[10]** Having heard oral submissions of parties on 17 November 2022, the learned High Court judge ('HCJ') ordered as follows:

(a) a declaration that the termination of the concession agreement dated 4 July 2017 via the termination notice dated 10 December 2018 is unlawful;

(b) general and/or special damages to be assessed by the court;

(c) defendants' amended defence and defendants' counterclaim dated 27 October 2022 be struck off; and

(d) costs of RM15,000 to be paid by the defendants to the plaintiff.

**[11]** The learned HCJ, made the following findings:

(a) the plaintiff requested the court to adjourn the trial to allow parties to further discuss and identify the documents that remain to be furnished. However, the HCJ denied this request, noting that the case was filed in 2019 and more than three years have passed without a resolution. The plaintiff was directed to call its first witness. However, counsel for the plaintiff submitted that the defendants had failed to fully comply with the order, and as such their defence and counterclaim must be struck out;

(b) as specified in para 6 of the order, non-compliance by the defendants will result in their defence and counterclaim being struck out without further order of the court. In such an event, judgment will be entered in favour of the plaintiff in accordance with the plaintiff's statement of claim;

(c) the plaintiff also asserted that it had sent three letters to the defendants, informing them of their failure to comply with parts of the order. Despite these communications, the defendants had not responded. The defendants have acknowledged their non-compliance and the resulting delay. Their failure to comply with the order leads to the automatic striking out of their defence and counterclaim; and

(d) the HCJ, guided by the Federal Court's decision in *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2012] 9 CLJ 557, reaffirmed that a peremptory order must be strictly adhered to, and non-compliance will result in the striking out of the action.

AT THE COURT OF APPEAL

**[12]** Dissatisfied with the decision of the High Court, the defendants appealed to the Court of Appeal ('COA').

**[13]** On 20 June 2024, the COA dismissed the appeal and affirmed the decision of the learned HCJ dated 17 November 2022.

**[14]** In dismissing the defendants/appellants' appeal, the COA made the following findings:

(a) the defendants' grounds of appeal focused wrongly on the discovery process rather than the core issue, that their defence and counterclaim had been struck out due to non-compliance with the order;

(b) the High Court's judgment was correctly based on para 6 of the order, which was a 'self-executing' order, meaning that upon non-compliance, the defendants' defence and counterclaim would be struck out automatically and judgment would be entered for the plaintiff;

(c) the learned HCJ acted within his discretion in refusing to adjourn the trial, and this could not be a ground for setting aside the judgment;

(d) the COA emphasised that all court orders even if irregular or inconvenient must be complied with unless set aside or varied. Ignoring them undermines the authority of the judiciary;

(e) the defendants failed to legally challenge the validity or effect of the 'self-executing' unless order, and thus, the appeal was found to be without merit; and

A (f) the High Court judge correctly applied the law in striking out the defence and entering judgment for the plaintiff, and the appeal was accordingly dismissed.

FEDERAL COURT APPEAL

B

**[15]** The Federal Court granted leave to the appellants/defendants to appeal on one question of law, namely:

> Whether the trial judge was bound by the unless order pronounced by the interlocutory proceeding judge when the unless order has the similar effect as though a summary judgment or judgment in default was entered against the appellants wherein it fails to comply with the provision of O 73 of the Rules of Court 2012 and s 42 of the Government Proceedings Act 1956.

C

D **[16]** The Court of Appeal had in its judgment stated that the High Court had correctly applied the law in entering default judgment for the plaintiff, which was primarily a declaration to the effect that the termination of the concession agreement was unlawful. I am, with the greatest of respect, unable to accept that finding of the Court of Appeal as being correct in law.

E

**[17]** A default judgment in the form of a declaration typically cannot be made without the court considering the merits of the case. Unlike claims for a fixed amount of money, where default is an admission of the debt, claims for non-monetary relief like declarations are discretionary. Courts generally do not F grant declaratory relief in default without an evidential basis and argument to support the claim, as doing so without the court's sanction and review of the facts may be seen as a denial of procedural fairness. In essence, the court acts as a safeguard when a claimant seeks a declaration via default or summary judgment, requiring a substantive review to ensure the relief is appropriate and G just, rather than simply rubber-stamping the request.

**[18]** Declarations are a form of specific relief, which is subject to the court's discretion, even if the defendant has not responded to the claim. A standard default judgment is not considered a judgment 'on the merits' in the sense of a H full trial. Thus, for declaratory relief, the court will require some level of scrutiny of the merits of the claim before making the order. The claimant must provide evidence of the factual matrix to enable a judge to exercise his discretion properly. The court needs to be satisfied that the claimant's case is a fit one for granting the specific relief sought. If a default judgment is entered I irregularly (without following proper procedure), it can be set aside as a matter of right.

**[19]** This principle was reiterated by the Federal Court in *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168 (FC). In that case, the Federal Court

was posed the following question of law:

> Whether an application for a declaratory judgment in default of defence pursuant to O 19 r 7(1) of the Rules of the High Court 1980 must be supported by evidence of the factual matrix to enable a judge to exercise his discretion in granting or refusing the declaratory relief prayed for?

**[20]** In answering that question, Richard Malanjum CJSS (as he then was) in speaking for the court held as follows:

> As declaration was the main prayer of the respondent it is a rule of practice that before such relief is granted there must be evidential basis to do so. Courts are very slow in granting declaratory prayer without any evidence and argument advanced.
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> In *Gan Boon Kyee v Yap Hong Sin & Anor* [1997] 2 MLJ 598 the Court of Appeal said this at p 601:
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> > I have read the judgment of the learned judicial commissioner with great care, bearing in mind that *this is not the case of an ordinary judgment in default but one of declaratory relief*. As observed by Zamir & Woolf on *The Declaratory Judgment* (2nd Ed) at p 264:
> >
> > > '... courts will generally be reluctant to grant a declaration as part of a default judgment in the absence of any evidence and argument. Before the court grants a declaration, it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief' per Gopal Sri Ram JCA (as he then was).
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> We are inclined to agree with the dicta in the above mentioned case.
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> In fact it is a rule of practice that 'the court does not make declarations of right either on admissions or in default of pleading' and the rule is quite entrenched as observed in the case of *Patten v Burke Publishing Co* [1991] 2 All ER 821. This is what Millet J said:
>
> > It is not the normal practice of this division to make a declaration when giving judgment by consent or without a trial as in the case of a judgment in default of defence or of notice of intention to defend the proceedings. That is a practice of very long standing. It was confirmed in *Wallersteiner v Moir* [1974] 3 All ER 217; [1974] 1 WLR 991. In that case the claim, which was contained in a counterclaim, sought a declaration that the plaintiff had been guilty of fraud, misfeasance and breach of trust. The judge granted the declaration in default of the defence and the Court of Appeal struck it out. Buckley LJ said ([1974] 3 All ER 217 at p 251, [1974] 1 WLR 991 at p 1029):
> >
> > > It has always been my experience, and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations

> ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation.

Scarman LJ gave judgment to the same effect but in somewhat different terms. He said ([1974] 3 All ER 217 at p 253, [1974] 1 WLR 991 at p 1030):

> There was of course a strong objection to the inclusion of the declaration sought in that case. Even after trial it is not the normal practice of the court to make a declaration that the defendant had been guilty of fraud or negligence. Justice can be done to the plaintiff by awarding him damages. If he wishes to parade the basis upon which damages have been awarded to him, he has a judgment which he can produce. The judgment will contain the findings of fraud or negligence upon the basis of which the damages have been awarded, and that should be sufficient for the plaintiff's purpose. But in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts been investigated. Quite apart from this, however, it is clear from *Wallersteiner v Moir* that the rule is a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without such a declaration. (Emphasis added).

**[21]** Now, it is very clear that in the present case, the default judgment containing the declaratory order was made without the benefit of any evidence on which the High Court could have properly exercised its discretion. Hence, applying the dicta of this court in *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd*, I am of the considered view that the default judgment granted summarily is not a proper judgment on its merits, as was noted by Scarman LJ in *Wallersteiner v Moir* [1974] 3 All ER 217; [1974] 1 WLR 991:

> But in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts been investigated.

**[22]** Hence, to that extent, I find that the Court of Appeal and the High Court have fallen into error. The judgment of the High Court is irregular, and the Court of Appeal's affirmation of that judgment is wrong in law. In the circumstance, in the absence of any supporting evidence, the trial judge was not bound by the terms of the order to grant default judgment on the basis of mere non-compliance of the order.

**[23]** In the circumstance of the facts of this case, the leave question is answered in the negative.

**[24]** My learned sister Hasnah bt Mohammed Hashim CJM, has read this judgment in draft and has agreed with the same.

**[25]** Wherefore, we would allow the appeal and set aside the judgment and order of both the High Court and Court of Appeal. The matter is remitted to the High Court for trial.

**Abu Bakar Jais PCA (delivering dissenting judgment of the court):**

INTRODUCTION

**[26]** The appellants before us were the defendants at the High Court ('HC') and the respondent was the plaintiff at the same court. I shall hereafter refer the said parties as they were at the HC. Judgment was entered for the plaintiff at the HC and the Court of Appeal ('COA') subsequently dismissed the defendants' appeal and affirmed the HC's decision. The Federal Court later gave leave to appeal for the defendants based on a single question of law that reads:

> Whether the trial judge was bound by the unless order pronounced by the interlocutory proceeding judge when the unless order has the similar effect as though a summary judgment or judgment in default was entered against the appellants wherein it fails to comply with the provision of O 73 of the Rules of Court 2012 and s 42 of the Government Proceedings Act 1956.

**[27]** Thus, the crux of the appeal before this court concerns a narrow issue ie can the non-compliance of a court order by the defendants mean that a final judgement can be entered against them as Government parties despite certain legislations as seen above.

BRIEF FACTS

**[28]** The facts pertaining to matters arising as basis for the claim itself are far less important compared to what transpired in court between the parties in preparation for the trial at the HC. Nonetheless, for context, the minimum relevant facts arising before the statement of claim was filed by the plaintiff can be stated as follows.

**[29]** The plaintiff entered into a concession agreement titled 'Perjanjian Perkhidmatan Penjualan Masa Siaran Iklan Radio Televisyen Malaysia (RTM) bagi tempoh Lima (5) Tahun' dated 4 July 2017 ('concession agreement'). The plaintiff claimed that the defendants breached this concession agreement and

had wrongly terminated the same. The plaintiff therefore claimed damages against the defendants.

**[30]** On the other hand, the defendants claimed that it was the plaintiff that had breached the terms of the concession agreement and therefore the same was rightly terminated. Hence, the defendants counterclaimed against the plaintiff.

**[31]** The case then was fixed for full trial before the HC.

AT THE HC

**[32]** In view of the application of the plaintiff before full trial in an interlocutory proceeding, the HC through the learned judge hearing the same, had ordered and directed the defendants to disclose and provide the plaintiff with some documents that were or had been in the defendants' possession ('order') but were not previously provided by the defendants in an earlier discovery order. The order stipulates these documents must be provided within 14 days of the same.

**[33]** This order also stated that if the defendants do not comply with the same, their amended defence and counterclaim will be struck out without further order of the court and the action herein will be adjudicated in favour of the plaintiff with the requisite orders and judgment entered in accordance with the plaintiff's statement of claim. In short, this is commonly referred to also as an 'unless order'.

**[34]** There is no evidence suggesting that the defendants had complied with this order.

**[35]** Instead, the defendants maintained this order could no longer be relied by the plaintiff as the same had waived its right to enforce the unless order. This is because the plaintiff had asked for the trial to be postponed. The plaintiff also had amended its statement of claim which gives the impression that the defence is still valid. In addition, the plaintiff had also filed its reply in response to the amended defence.

**[36]** The plaintiff in response, submitted none of the above reasons given by the defendants could mean that the former had waived its right to rely on the order for its benefit. In fact, it had reserved its right to proceed with the order when necessary.

**[37]** The HC on the date of trial, decided through the learned judicial commissioner who acted as the trial judge, that the order is still good for the plaintiff and that the non-compliance of the same by the defendants would

only mean that the amended statement of defence and counterclaim could not stand as the order stated the amended defence and counterclaim will be struck out without further order of the court and the action herein will be adjudicated in favour of the plaintiff with the requisite orders and judgment entered in accordance with the plaintiff's statement of claim if the documents were not disclosed. There is also no appeal lodged by the defendants against the order made.

**[38]** Essentially, the learned judicial commissioner gave effect to the order made by the learned judge.

**[39]** As a consequence, the HC granted the plaintiff as requested, a declaration that the termination of the concession agreement by the defendants is unlawful, damages and costs. That effectively means that final judgement was entered for the plaintiff against the defendants.

AT THE COA

**[40]** The defendants went before the COA for the appeal against the decision of the HC but essentially the COA found that the order was clear, unequivocal and unambiguous requiring the defendants to obey the same. Failure by the defendants to comply with the terms of the order according to the COA, meant that the HC was correct to enter judgment against the defendants.

**[41]** Further, the COA found that non-compliance of the order resulted in the amended defence and counterclaim by the defendants being rightly struck-out. The COA was of the view that all court orders must be obeyed and those who ignored them, do so at their own peril.

QUESTION OF LAW

**[42]** Having noted the question of law posed for the present appeal as narrated earlier, several features stand out in the same and they are as follows:

(a) the question is posed whether the trial judge (the judicial commissioner) must follow the order made by the learned judge (the interlocutory proceeding judge) before the date of the trial;

(b) the defendants equate the order similarly as a summary judgment or judgement in default; and

(c) such judgement could not be entered against the defendants as it contravenes O 73 of the Rules of Court 2012 and s 42 of the Government Proceedings Act 1956.

ORDER 73 OF THE RULES OF COURT 2012 AND S 42 OF THE GOVERNMENT PROCEEDINGS ACT 1956

**[43]** In its written submission for the appeal before this court, the defendants cited and focused on O 73 of the Rules of Court 2012 ('the ROC'). This provision is about proceedings by and against the Government. Specifically, the defendants referred to O 73 r 5(1) of the ROC that states as follows:

> An application against the Government shall not be made under Order 14, rule 1 or Order 81, rule 1 in any proceedings against the Government nor under Order 14, rule 5 in any proceedings by the Government.

**[44]** In turn, the above O 14 r 1 states as follows:

> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

**[45]** Essentially O 14 r 1 stated above allows for summary judgment to be entered. This would mean the normal trial would be dispensed with and judgment can be entered before trial proper.

**[46]** While O 81 r 1 also stated above, speaks about judgment could be entered if there is no defence for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages. Order 81 r 1 states as follows:

> (1) In an action begun by writ endorsed with a claim:
>
> (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages;
>
> (b) for rescission of such an agreement; or
>
> (c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the court for judgment.

**[47]** While in respect of s 42 of the Government Proceedings Act 1956 ('the GPA'), this provision essentially is about proceedings by and against the Government including cases pertaining to summary judgment.

THE DEFENDANTS' SUBMISSION

**[48]** In gist, the defendants argued that both the above provisions are subjected to O 73 r 5(1) of the ROC as narrated earlier which disallows summary judgment against the Government.

**[49]** In this regard, the defendants equate the order given by the learned judge for the disclosure of the documents and the unless order given to enter judgment against the defendants in the event that the documents are not disclosed, as a summary judgement against the defendants. Therefore, according to the defendants, when judgment was entered against them by the learned judicial commissioner, in view of the order, the HC went wrong as O 73 r 5(1) of the ROC, as stated above, prohibits summary judgement against Government including the defendants.

THE PLAINTIFF'S SUBMISSION

**[50]** In summary, the plaintiff contended that the order is legal and binding including on the learned judicial commissioner as the trial judge. The judicial commissioner had used his discretion correctly to give effect to the order. It is a court order that must be followed unless set aside. There is also no appeal by the defendants when the order was made. This indicates they accepted the same.

**[51]** The order is clear that if it is not obeyed, the defence and counterclaim will be struck out without further order of the court and judgment will be entered in accordance with the plaintiff's statement of claim. Compliance of the order was therefore crucial by the defendants with serious consequences if it is not obeyed.

**[52]** The plaintiff did not waive it rights to the order. In fact, the plaintiff wrote letters to the defendants reminding them to disclose the documents as required by the order.

DECISION

**[53]** The order could not be equated as summary judgment as submitted by the defendants. The order made has a clear distinction compared to a summary judgment. The order was made as preliminary direction given for the disclosure of the documents before full trial. While a summary judgment is granted by evaluating the pleadings to conclude there is no defence to the claim filed. The order was made even before the need to evaluate the defence. The non-compliance with the terms of the order by the defendants resulted in judgment being entered against them. It does not require the evaluation of the

defence. That is precisely with respect why the defendants are in error to consider the order as similarly as a summary judgment.

**[54]** It could not be correct law to say the defendants are absolved from liability because they are Government entities and as such, no judgment could be entered against them as it amounts to summary judgment against the Government in this case. The judgment must be entered against the defendants as they had simply disobeyed the order which includes the unless order. It has no nexus with a summary judgment.

**[55]** The action of the defendants in not complying with the terms of the order is quite clear. If the unless order is not given effect, the defendants not only could avoid obligation to disclose the documents but also has the effect of allowing the defendants to ignore the directions of the courts. This among others would directly hamper and frustrate the ability for courts to issue directions to properly manage the case before the trial as provided by O 34 of the ROC for pre-trial case management. It is common knowledge that the courts now have increasing cases for disposal and this provision is a fundamental tool for the courts in managing these cases before trial. This includes giving pre-trial directions such as in the present appeal for the production of the documents by the defendants as required by the order.

**[56]** Further, there can be no doubt that the order is a binding court order issued in the ordinary course of court proceedings. The order thus must be obeyed and any judgment or ruling to the contrary will not only invite disrespect to directions issued by the courts by such orders but also gives the damaging impression that there are instances that court orders need not be complied with. In this regard, it is also relevant to note that the Federal Court in the case of *Ann Joo Steel Berhad v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2019] MLJU 843; [2019] 5 MLRA 553 said:

> [65] The fundamental principle which is pivotal in all these decisions, is that the sanctity of a court order must at all times be observed, and a party bound by that order of a court has no business deciding for himself that a binding order of a court need not be observed because in his view it is not valid. If court orders are allowed to be ignored with impunity, it will ruin the authority of judicial order, which is the core of all judicial systems. In line with our jurisprudence, court orders must be respected and complied with. There will be no end to litigation if parties are allowed to determine for themselves that any order of the court would be observed or otherwise.
>
> [66] It is, therefore, a long established principle of law that one may apply to set aside an order of a superior court but it must be made in a direct and specific proceeding filed for that purpose be it in the same proceedings or a separate one. It cannot be contested merely by raising it as defences in a suit as being undertaken in

these appeals. The underlying reason for this legal jurisprudence to be adhered to, is not difficult to appreciate. It is to preserve the sanctity as well the finality of an order of court. We therefore do not find any reason to depart from all these earlier decisions on this particular point.

**[57]** In the present case before us, not only the order was not set aside in any proceedings but the defendants also did not appeal against the grant of the same. The effect of not appealing meant that the defendants accepted the terms of the order. A case in point regarding the failure to appeal is this court's decision in *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461; [2012] 9 CLJ 557; [2013] 1 MLRA 181 which among others dealt with the order at the lower court to strike out the suit. Similarly, there was no appeal against this order to strike out. This court hence said:

> [20] We also find that the plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the plaintiff accepted the correctness of the decision to dismiss its suit. Further, the failure to appeal has itself been recognised as an abuse of process because the second suit would be construed as an attempt to circumvent the appeal procedure.

**[58]** The unless order contained in the order itself is also unambiguous in stating if the order is not adhered to, the defendants' amended defence and counterclaim 'shall stand struck out without further order of court and the action herein shall be adjudged in the plaintiff's favour'. Thus, it is self-executing in nature and the failure to comply with the order, should mean the defendants must face the consequences and penalty that accordingly ensued. In this regard, Mohd Zawawi Salleh JCA (as he then was) in *Hup Soon Omnibus Co Sdn Bhd & Anor v Lim Chee @ Lam Kum Chee* [2017] MLJU 1937; [2018] 1 CLJ 641 said:

> [12] Before parting with this appeal, we would like to emphasise that a court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity, this would destroy the authority of judicial orders which is the heart of all judicial systems. We hold a firm view that a court order is not a mere technical rule of procedure that can be simply ignored. In our jurisprudence, court orders must be respected and complied with. Those who choose to ignore them do so at their own peril.

**[59]** I am also of the opinion that the order was made pursuant to an application from the plaintiff by virtue of O 24 of the ROC for the discovery of the documents and we consider this provision is specific in nature. This is in contrast to O 73 of the ROC which is more of a general provision relied by the defendants on proceedings by and against the Government. Hence, the principle of 'generalia specialibus non derogant' ('general things do not detract from special things') would thus apply against the defendants. In this sense, the

application regarding the disclosure of the documents must take precedence over the issue of whether summary judgement had been entered against the defendants.

**[60]** I am also of the view that s 42 of the GPA as noted earlier would not assist the defendants in the present appeal as the order is a specific order about the requirement to disclose the documents and has no or little connection with a summary judgment. The non-compliance of the order itself and the court's direction regarding the documents resulted in judgment being entered against the defendants and not because there are no merits to the defence and counterclaim of the defendants.

CONCLUSION

**[61]** Based on all the foregoing, I would answer the question of law by saying the trial judge was bound by the unless order pronounced by the interlocutory proceeding judge but I do not agree that the unless order has similar effect as though a summary judgment or judgment in default was entered against the defendants.

**[62]** The appeal is hereby dismissed.

*Appeal allowed; judgment and order of High Court and Court of Appeal set aside; matter remitted to High Court for trial.*

Reported by Dzulqarnain Ab Fatar